

ST 01-0086-GIL 05/02/2001 SALE FOR RESALE

To be valid in Illinois a Certificate of Resale must contain the items of information listed in 86 Ill. Adm. Code 130.1405(b). (This is a GIL).

May 2, 2001

Dear Xxxxx:

This letter is in response to your letter dated March 13, 2001. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), which can be accessed at <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

In your letter, you have stated and made inquiry as follows:

I need information regarding sales tax on sales that COMPANY makes to a customer outside of the United States. COMPANY sells equipment to a European company and drop ships the equipment to the European company's customers in Illinois. The European customer is not registered to collect sales tax in Illinois. These transactions are resales, but I do not know what I need to have on file to relieve COMPANY of sales tax liability. Is there a resale certificate or other form that our European customers can complete? Please respond in writing.

If you have questions or need more information, my number is #####.

You have described a drop-shipment situation that is the subject of 86 Ill. Adm. Code 130.225, enclosed. As described in the regulation, a drop shipment situation is one in which a seller (A) makes a sale to an out-of-State company (B) and drop-ships the items to B's customer (C) located in Illinois. Company A (seller) has nexus with Illinois sufficient to require it to collect Use Tax on tangible personal property delivered to Illinois locations and it is registered with Illinois. Also, Company B (buyer) is not registered with Illinois.

As a seller required to collect the Illinois Tax, A must either charge tax or document an exemption when it makes a delivery in Illinois. In order to document the fact that the sale to B is a sale for resale, A must obtain a valid Illinois Certificate of Resale from its customer (B). The fact that B may be located in another state or country is immaterial and does not change the requirement for B to provide a valid Certificate of Resale to A. Because the sale involves a delivery to an Illinois location, the Certificate of Resale must be valid in Illinois and contain the items of information listed in 86 Ill. Adm. Code 130.1405(b), enclosed. If Company B does not provide acceptable Illinois documentation, seller A will be required to charge and collect tax from B on A's gross receipts from the transaction.

If B has no nexus whatever with Illinois, it is unlikely that it will be registered with Illinois. If that is the case, and if B has no contact with Illinois which would require it to be registered as an out-of-State Use Tax collector for Illinois, then it could obtain a resale number which would provide it the wherewithal to supply a required number to A in conjunction with a Certificate of Resale. We hope the following descriptions of out-of-State Use Tax collectors and persons who qualify for resale numbers will be useful.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts of sales and must collect the corresponding Use Tax incurred by purchasers.

So long as B does not accept purchase orders in Illinois, and so long as the items it sells are not located in Illinois at the time it sells them, it need not register as a retailer.

Out-of-State sellers who fall under the definition of a "retailer maintaining a place of business in this State" (see 86 Ill. Adm. Code Sec. 150.201(i), enclosed), must register to collect Illinois Use Tax from Illinois customers and remit that tax to the Department. See 86 Ill. Adm. Code Sec. 150.801(c), enclosed. The retailer must collect and remit Use Tax to the State on behalf of his Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The provisions of this regulation are subject to the U.S. Supreme Court ruling of *Quill v. North Dakota*, 112 S. Ct. 1902 (1992), in which the Supreme Court set forth guidelines for determining what nexus requirements must be met before a business is properly subject to a state's tax laws. *Quill* invoked a two-prong analysis consisting of 1) whether the Due Process Clause is satisfied, and 2) whether the Commerce Clause "substantial nexus" test is met before the state can impose tax collection responsibilities.

The due process test will be met if requiring the retailer to collect state sales tax is fundamentally fair to the retailer. If the retailer intentionally avails itself of the benefits of the taxing state's economic market, then due process is satisfied, Quill at 1910.

Notwithstanding the fact that due process has been met, a business must also have a physical presence in the taxing state in order for the "substantial nexus" test to be met under the Commerce Clause and before a state can impose tax collection responsibilities on an out-of-State retailer. A physical presence does not mean simply an office or other physical building. Under Illinois tax law, it also includes the presence of any representative or other agent of the seller. The representative need not be a sales representative, and it is immaterial for tax purposes that the representative's presence is temporary.

If B has no contact with Illinois, it does not fall within the definition of a "retailer maintaining a place of business in this State", and it need not register as an out-of-State Use Tax collector.

Resale numbers are issued to persons who make no taxable sales in Illinois but who need the wherewithal to provide suppliers with Certificates of Resale when purchasing items which will be resold. So long as B does not act as an Illinois retailer and so long as it does not fall under the definition of a "retailer maintaining a place of business in this State", its sales to Illinois customers are not subject to Illinois Retailers' Occupation Tax liability and it cannot be required to act as a Use Tax collector. So long as this is true, it qualifies for a resale number which does not require the filing of

tax returns with the Department. Information about acquiring a resale number can be obtained by calling the Department's Central Registration Unit at (217)-785-3707.

Please note that the fact that B may not be required to act as a Use Tax collector for Illinois does not relieve its Illinois purchaser of Use Tax liability. Therefore, if B does qualify for a resale number, its customer would have to pay its tax liability directly to the Illinois Department of Revenue.

Section 2c of the Retailers' Occupation Tax Act contains the following provision that would allow "other evidence" to be submitted by a purchaser to document the fact that its sale is for resale:

"Failure to present an active registration number or resale number and a certification to the seller that a sale is for resale creates a presumption that a sale is not for resale. This presumption may be rebutted by other evidence that all of the seller's sales are sales for resale or that a particular sale is a sale for resale." 35 ILCS 120/2c

Such evidence could consist of, for example, an invoice from B to its customer, showing that the item was actually resold, along with a statement from B explaining why it had not obtained a resale number and certifying that the purchase was a purchase for resale in Illinois. While "other evidence" is acceptable under the law, we prefer that B obtain a resale number and provide that number on a Certificate of Resale. There is a strong possibility that an Illinois tax auditor will scrutinize "other evidence" more closely than a Certificate of Resale.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of Section 1200.110(b).

Very truly yours,

Karl W. Betz
Associate Counsel

KWB:msk
Enc.